No. 2827

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF CREECH BROTHERS LUMBER COMPANY, a corporation,

Bankrupt.

APPEAL AND REVIEW FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT AND PETITIONER FOR REVIEW.

R P. OLDHAM,
R. C. GOODALE,
Attorneys for Appellant and Petitioner,
WALTER L. NOSSAMAN,
Of Counsel,
1408 Hoge Building,
Seattle, Washington.

SHERMAN PRINTING & BINDING CO., SEATTLE, WASH.

No. 2827

In the United States Circuit Court of Appeals

For the Ninth Circuit

IN THE MATTER OF CREECH BROTHERS LUMBER COMPANY, a corporation,

Bankrupt.

APPEAL AND REVIEW FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT AND PETITIONER FOR REVIEW.

A large portion of the respondent and appellee's brief is based upon the assumption that this proceeding is brought by the receiver of the United States National Bank, one of Creech Brothers' creditors (Appellee's brief, 21, 42). While the case is brought to this court by Titlow, Receiver of the United States National Bank, he is acting *in the name of the trustee in bankruptcy under leave of court.* The rights here

asserted are *those of the trustee.* The objections to the allowance of the MacPhail claim were filed with leave of court first obtained for and in behalf and in the name of the trustee (50, 65). The right to so file objections is conferred by the Bankruptcy Act, Sec. 57 d and k, General Order in Bankruptcy, Nos. 21, 6. The practice of permitting objections to be filed and appeals taken by creditors in the name of the trustee where the trustee refuses to act is common.

1 *Loveland on Bankruptcy,* Secs. 347-349;
Ohio Valley Bank vs. Mack, 163 Fed. 155, C. C. A., 6th Cir.;
Chatfield vs. O'Dwyer, 101 Fed. 797, C. C. A., 8th Cir.

Obviously the purpose of permitting creditors to file objections to the allowance of claims is to provide an additional safeguard against fraudulent or negligent inaction on the part of the trustee himself. The purpose of the bankruptcy act would be defeated if the bankrupt or some favored creditor could, by finding fault with the creditor assuming for the time being the burden of representing all the others, defeat the rights of the trustee who, charged with the duty of protecting the estate, represents the innocent as well as the guilty. Leave of court having been once granted that certain objections be filed *in the name of the trustee, all the creditors* have a right to rely on such

objections. Is it to be said that after the time for filing objections has expired, the trustee's rights can be defeated by showing that the creditor who chances to be acting for the moment as the instrument of the court in enforcing the trustee's rights would not personally and individually be entitled to make the objections?

There can be no estoppel against this creditor, but even if there were, the fact that the objections were *by leave of court* and made by and in the name of the trustee is conclusive. The creditor who volunteers to perform this service upon the refusal of the trustee to act simply carries the burden of the litigation and the costs of non-success. Such creditor, however, is equipped with all the rights of the trustee himself. The *creditor* is thus not *himself* a party to the proceeding. He could not waive and dismiss his objections without the *leave of court* and opportunity given to other creditors to come forward and protect the rights of the estate. This is proper. If it were otherwise, a convenient mode would be provided for the protection of fraudulent preferences and dishonest claims through the collusive selection of a trustee. The referee and the court below treated these objections as objections of the trustee; directed that such objections be made and that these appellate proceed-

ings be taken on behalf of the trustee. The creditors of the estate have relied upon the proceedings to protect the whole estate.

NO ESTOPPEL AGAINST THE UNITED STATES BANK OR ITS RECEIVER.

The United State National Bank was not, it will be remembered, a creditor of the Lumber Company at the time of the assignment to MacPhail. It later became a creditor through lending several thousand dollars to the Lumber Company upon its notes (47, 60).

There is nothing in the record to support the repeated statement of the respondent at pages 3 *and* 14 that the United States National was a successor in interest to another bank, to-wit, the Willapa Harbor State Bank of Raymond, and *respondent has failed to cite* any portion of the record substantiating his statement. It is clear that all the obligations of the bankrupt to the United States National arose *after* the assignment to MacPhail. None of these claims could have been tainted by passing through the hands of some one who *had* assented to the arrangement. The contention is made that the bank knew all about the MacPhail assignment *at the time* the bankrupt became indebted to it. As to this there is no proof in the record. Knowledge even if shown does not necessarily imply assent. It is claimed that Gilchrist and

Dysart, two officers of the United States National, were active in procuring signatures to the waiver by creditors. But this has not the slightest tendency to prove the knowledge or consent of the bank. Gilchrist besides being an officer of the United States National was also an officer of the Willapa Harbor bank, which was a heavy creditor (52). There is no proof that he was in this matter representing the United State National in any way. In fact, it would seem that the bank had no interest in the matter, as it admittedly was not a creditor at the time. Gilchrist's actions are therefore consistent with (a) either that he was acting in a purely private capacity, or (b) that he was acting as a representative of the *Willapa Harbor* bank, of which he was president. This is immaterial, since notice to a corporate officer as an individual or as a representative of some other principal is not notice to his corporate principal. In *Manufacturers' National Bank vs. Newell,* 37 N. W. 420 (Wis.), two persons were respectively director and president of a corporation taking a note with knowledge of a defense to it. These two persons were respectively president and cashier of the plaintiff bank, which later became the holder of the note. The court held that this did not charge the bank with notice.

"The mere fact that some of the directors and officers of the bank were also directors and officers of

the company did not impart to the bank the same constructive notice as was chargeable against the company."

See also

Merchants' National Bank vs. Lovitt, 21 S. W. 825 (Mo.);
American Surety Co. vs. Pauly, 170 U. S. 160;
German-American State Bank vs. Soap Lake Co., 77 Wash. 332.

All that the record in this case shows is that the president of the Willapa Harbor bank, who happened also to be an officer of the United States National, knew something about the transaction. Such proof falls far short of showing any knowledge or assent on the part of the United States National.

Further, the creditors' agreements which these officers are shown to have known about are entirely different from the agreement between MacPhail and the bankrupt. As to this, *there is no proof that any one connected with the United States National Bank ever heard of it.*

R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Appellant and Petitioner,

WALTER L. NOSSAMAN,
Of Counsel.